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FILED

January 6 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0630

SHANE BUCHER,

Plaintiff and Appellant,

v.

PATRICK HAROLD HUGHES,

Defendant and Appellee.

FILED

JAN 06 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

MOTION TO DISMISS APPEAL

Patrick Harold Hughes (Hughes), the Appellee, moves to dismiss the notice of appeal and requests the Court stay mediation pending resolution of this motion. Appellant, a victim of the crime, has no standing to appeal the ruling denying the State's petition to revoke.

Counsel for the Appellant objects to this motion.

INTRODUCTION

Toole County Cause No. DC-01-028 charged Hughes with negligent vehicular assault, a violation of Mont. Code Ann. § 45-5-205(3), and two other crimes. (Info., D.C. Doc. 3.) Hughes and the State entered into a plea agreement. (Acknowledgment, D.C. Doc. 18; Plea Agreement, D.C. Doc. 19.) After accepting his plea of guilty to negligent vehicular assault, the district court entered judgment on June 19, 2003. (J., D.C. Doc. 31.)

On May 7, 2009, the State petitioned to revoke Hughes' six-year suspended sentence, which expired June 5, 2009. (Petition for Revocation of Suspended Sentence, D.C. Doc. 45; Appellee's App. 1.) The petition's sole ground was that Hughes had paid only \$7,470.00 towards the restitution of \$37,133.70 ordered for Bucher. After a hearing, accepting the probation officer's testimony, the court denied the petition, deciding Hughes complied in good faith. It entered judgment under Mont. Code Ann. § 46-18-249 for the unpaid restitution of \$29,463.70. (Or. Denying Petition for Revocation, D.C. Doc. 59; Appellee's App. 2.) The court entered a civil judgment in favor of Shane Bucher, the Appellant, after which Bucher appealed. (J., D.C. Doc. 60; Appellee's App. 3; Notice of Entry of Judgment, D.C. Doc. 61.)

ARGUMENT

Bucher has no standing to bring this appeal. The record shows that the civil judgment was in the amount authorized by the district court in its order denying the petition to revoke probation. Bucher simply objected to Hughes' release from supervision because it obviated the State's role in collection.

At the June 29, 2009 hearing, after questioning Jodi Rismon, the probation officer (Tr. at 14), Bucher argued:

- a) that Hughes had not signed up for community service to Eagle Mount, an organization in Great Falls providing services for handicapped people (Tr. at 15);

b) that Hughes' efforts at paying restitution were "woefully inadequate," considering Hughes' income and expenses (Tr. at 19-20).

Rismon agreed that Hughes had "made a good faith effort" to make restitution, given his resources. (Tr. at 11-12.) Rismon said that she had approved substitution of other organizations--4-H and a soccer group--because Hughes, who worked six days a week, did not have time to travel to Great Falls. Hughes met the total hours required for community service. (Tr. at 16.) The State agreed that it was "the Court's choice" whether to extend probation or convert the restitution to a civil judgment. (Tr. at 17-18.)

AUTHORITIES

Neither Mont. Code Ann. § 46-18-249, which provides for civil judgment for a victim, nor any other statute gives a victim standing to appeal a decision by a court in a criminal proceeding. Section 46-1-502 provides for mediation of certain crimes before a verdict, and § 46-1-501 includes a victim as a party to *mediation*. No other statute vests a victim with the status of a party to an action, including § 46-11-701, which grants a victim an interest in being present in proceedings closed to the public. Section 46-18-101 provides for a victim's interests in sentencing. Section 46-18-112 allows for consultation with the victim by a probation officer. Section 46-18-115 requires a court to hear a victim at sentencing. Full restitution is required by §§ 46-18-201(5) and -241 through -249. Section 46-18-249 allows restitution to be treated as a civil judgment after

supervision ends to be collected by any legal means. It does not provide the victim with status as a party or other appeal rights for the proceedings leading to the calculation of the restitution amount or the disposition of the defendant's supervision--or any other portion of the sentence. Section 46-24-104 requires consultation by the prosecutor "to obtain the views" of a victim or the victim's family before dismissal, release, negotiation, or diversion--without making a victim a party. Section 46-24-106 requires a court to allow a victim or family member at certain proceedings. The balance of Chapter 24 grants other rights to victims--but not party status. Section 46-24-211 vests a victim with the right to be informed of an appeal--but not the right to participate in its conduct.

This Court has not rendered an opinion on the issue here, except to state, "Statutes granting the right of appeal to the state in criminal actions must be strictly construed and limited to the instances mentioned." *State v. Sanchez*, 187 Mont. 434, 437, 610 P.2d 162, 164 (1980).

Interpreting the Victim & Witness Protection Act, 18 U.S.C. § 3663 *et seq.*, the Ninth Circuit Court of Appeals said:

Nowhere in the statute does Congress suggest that the VWPA was intended to provide victims with a private remedy to sue or appeal restitution decisions, and nothing in the statute's legislative history supports such a reading, either.

United States v. Mindel, 80 F.3d 394, 397-98 (9th Cir. 1996). *See also, United States v. Johnson*, 983 F.2d 216, 217, 220 (11th Cir. 1993) (distinguishing victims'

interests from those of the Government--the former compensatory, the latter penal, in which a victim has no standing to appeal). Interpreting a later provision of the Mandatory Victims Restitution Act, 18 U.S.C.S. § 3664(m)(1)(B), *United States v. Perry*, 360 F.3d 519, 524 (6th Cir. 2004), vacated the order releasing a victim's judgment lien *after it was entered*: "The law does not provide any limits on the victim's ability to obtain a judgment lien and it provides no express means by which a district court can alter a victim's lien rights *post hoc*." The district court here *granted* judgment. In *United States v. Grundhoefer*, 916 F.2d 788, 793 (2d Cir. 1990), the court denied appellate standing, concluding the 1988 version of the VWPA accorded a victim "only a limited presence at a sentencing proceeding[,]" without the right to appeal an inadequate remedy. *See also, Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."). Further, the North Dakota Supreme Court, in *North Dakota v. Leingang*, 2009 ND 38, ¶¶ 19-20, 763 N.W.2d 769, concluded that that "citizens or victims who are not parties to a criminal action do not have standing to challenge prosecutorial or judicial decisions in the action[,]" stating:

State courts also have held that victims are not parties to a criminal prosecution and generally do not have standing to challenge compliance with laws for victims' rights. *See Cooper v. District Court*, 133 P.3d 692, 695-714 (Alaska Ct. App. 2006) (rejecting various arguments that victim had standing to challenge criminal sentence); *Lamb v. Kontgias*, 169 Md. App. 466, 901 A.2d 860, 864-

69 (Md. Ct. Spec. App. 2006) (holding victim was not party to criminal prosecution and did not have standing to appeal lack of notice and opportunity to speak at hearing to reconsider sentence); *Commonwealth v. Malloy*, 304 Pa. Super. 297, 450 A.2d 689, 693 (Pa. Super. Ct. 1982) (holding criminal victim was not a party to criminal prosecution and did not have standing to appeal decision dismissing complaint); *In re State ex rel. Sistrunk*, 142 S.W.3d 497, 502-03 (Tex. Ct. App. 2004) (holding victim's family had no standing to challenge defendant's sentence or procedures at sentencing hearing).

CONCLUSION

Bucher attempts to appeal the court's discretionary denial of revocation. He may record his judgment, but no statute allows him to challenge the court's ruling.

Respectfully submitted this 6th day of January, 2010.

OFFICE OF THE STATE PUBLIC DEFENDER
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By: Joselyn Hunt
JOSELYN HUNT
Chief Appellate Defender

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing

Motion to Dismiss Appeal to be mailed to:

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DATED: 1/6/2010 Sarah Brader

APPENDIX 1

1. Condition #2: Restitution:


The Defendant shall pay court ordered restitution to the victim in the amount of \$37,133.70 in monthly payments. The payments to be made as determined by the Court and/or the Probation & Parole Officer.

Violation:

As of April 20, 2009, the Defendant has paid \$7,470.00 towards the total restitution.

Wherefore the Petitioner prays the Court finds probable cause to support this Petition for Revocation of Suspended Sentence alleging violations of the probation conditions and that the Court issue an Notice to Appear and Order Setting Hearing on the Petition.

Respectfully submitted this 7th day of May, 2009.



Merle Raph,
Toole County Attorney

APPENDIX 2

FILED

AUG 11 2009

Debra M. Rismon
CLERK
DEPUTY

MONTANA NINTH JUDICIAL DISTRICT COURT, TOOLE COUNTY

STATE OF MONTANA,	*	Cause No. DC-01-028
Plaintiff,	*	
vs	*	ORDER DENYING PETITION FOR
	*	REVOCATION OF SUSPENDED
PATRICK H. HUGHES,	*	SENTENCE AND ENTRY
	*	OF CIVIL JUDGMENT
Defendant.	*	BK 4 pg 101

On June 19, 2003, Judgment was entered in this matter, providing that Defendant, Patrick H. Hughes, was committed to the Department of Corrections for a term of six years, with all six years suspended, required to pay certain administrative expenses associated with probation supervision, ordered to adhere to certain conditions, including completion of community service hours as approved by his probation and parole officer and ordered to pay the sum of \$37,133.70.

On or about May 7, 2009, the State of Montana filed a Petition for Revocation of Suspended Sentence alleging that Defendant had failed to pay the entire sum of Restitution during the six year term of his suspended sentence. The parties appeared on June 29, 2009, for a hearing on the State's Petition. Testimony was taken from the State's witness, Jodi Rismon, Adult Probation and Parole Officer for the State of Montana. Ms. Rismon testified that Defendant has completed all of his conditions of release, with the exception of payment of Restitution. Ms. Rismon testified that Mr. Hughes had made a good faith effort to pay the restitution given his financial obligations, including child support, and his income. She indicated that she received monthly budgets from Mr. Hughes and that she believed he had made reasonable efforts to make payments of \$100 per month toward the obligation. She further

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indicated that \$100 was an amount which she determined was a reasonable contribution toward the restitution. No other violations of Defendant's conditions of his suspended sentence are alleged and Ms. Rismon testified that Defendant complied fully with all other conditions of his suspended sentence.

The victim of the offense, Shane Bucher, was present at Court and his interests were represented by counsel, Lawrence A. Anderson, who was permitted, over objection, to question the witness. The victim disputes that the Defendant has made a good faith effort to pay restitution in spite of Defendant's compliance with the terms of his probation and requests that this Court continue to supervise the Defendant in order to collect monies owed to the victim. At no time during these criminal proceedings was Mr. Bucher foreclosed from obtaining a civil judgment for damages resulting from this incident. The Court, in a criminal proceeding, has many concerns to address -- only one of them is restitution to the victim. The victim in this matter will be able to execute on a judgment and proceed in that manner to collect his restitution.

The Court being advised in all respects, therefore, enters the following ORDER:

The Petition for Revocation of Suspended Sentence is DENIED.

The Court hereby enters Judgment in favor of the victim, Shane Bucher, in the amount of the unpaid restitution, which is \$29,463.70, pursuant to Mont. Code Ann. §46-18-249.

ISSUED this 11th day of August, 2009.


LAURIE MCKINNON
DISTRICT JUDGE

CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail upon MR. Bucher at their address this 11th day of August, 2009

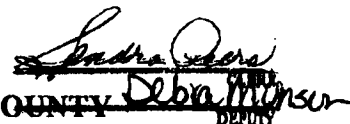
By Debra Munson Deputy
Clerk of District Court
P.O. Box 850 Shelby, MT 59474
Phone 406-434-2274 406-8330

APPENDIX 3

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NOV 13 2009

MONTANA NINTH JUDICIAL DISTRICT COURT, TOOLE COUNTY


Debra Munson
DEPUTY

SHANE BUCHER,

Plaintiff

Cause No.: DC-01-028

-VS-


Hon. LAURIE MCKINNON

PATRICK HAROLD HUGHES,

Defendant.

JUDGMENT

Pursuant to the provisions of §46-18-249 MCA and the Order attached hereto and incorporated herewith, judgment is hereby entered for Shane Bucher in the amount of \$29,463.70 (twenty-nine thousand, four hundred sixty-three dollars and seventy cents) against Patrick H. Hughes, Defendant.

DATED this 13th day of November 2009.
Laurie McKinnon
District Court Judge

CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail upon MR. SHANE BUCHER at their address this 13th day of November 20 09

Clerk of District Court

By Debra Munson, Deputy

P.O. Box 850 Shelby, MT 59474

Phone 406-434-2271 404-8330

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